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No. 84-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MULTI-STATE COMMUNICATIONS, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

J. ROGER WOLLENBERG *
JOEL ROSENBLOOM
TILLMAN L. LAY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

HAROLD DAVID COHEN
WILLIAM H. FITZ
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Counsel for Respondent RKO General, Inc.

October 19, 1984

* Counsel of Record

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QUESTIONS PRESENTED

Pursuant to Section 331 of the Communications Act of 1934, as amended, the Federal Communications Commission reallocated VHF Channel 9 from New York City to Secaucus, New Jersey and issued a license for that frequency to RKO General, Inc.,* the existing licensee of VHF Channel 9 in New York. The Commission also dismissed as moot pending comparative hearing proceedings for VHF Channel 9 in New York. The petition raises two issues:

1. Whether the Court of Appeals erred in construing Section 331 of the Communications Act to require the actions taken by the Commission.

2. Whether the Court of Appeals erred in concluding that the Commission's application of Section 331 of the Communications Act did not violate the Due Process Clause of the Fifth Amendment.

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* The parent company of RKO General, Inc. is Gencorp, Inc. Frontier Holdings, Inc., is the only partially owned subsidiary of RKO General, Inc. For purposes of Rule 28.1 of the Rules of this Court, we construe the term "affiliate" to exclude other subsidiaries of the parent company of RKO General, Inc.

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BRIEF IN OPPOSITION FOR RESPONDENT RKO GENERAL, INC.

Respondent RKO General, Inc. (Intervenor below) submits this brief in opposition to the petition for writ of certiorari filed by petitioner Multi-State Communications, Inc. ("Multi-State").[1]

STATEMENT

Petitioner seeks review of a decision by the United States Court of Appeals for the District of Columbia Cir-

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[1] Citations to "Pet. App. ——a" refer to appendices to the Petition for Writ of Certiorari filed by petitioner Multi-State Communications, Inc.

cuit affirming two orders of respondent Federal Communications Commission ("the Commission") pursuant to which the Commission (1) reallocated VHF Channel 9 from New York City to Secaucus, New Jersey, (2) granted respondent RKO General, Inc. ("RKO"), the then-existing licensee of Channel 9 in New York, a five-year broadcast license for the reallocated channel, and (3) dismissed as moot both the renewal application of RKO and the competing application of Multi-State to broadcast on Channel 9, New York. The orders were issued pursuant to Section 331 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 331 (1982), a provision adopted on September 3, 1982.

The following is intended to supplement the Statement of respondent Commission in ways we believe will aid the Court in the disposition of this Petition.

A. The License Renewal Proceeding

Respondent RKO owns and operates a number of television and radio stations throughout the country. Among its stations is WOR-TV, which operates on the channel at issue in these proceedings. Continuously from 1952 until the issuance of the Commission orders in question here, RKO was the licensee of VHF Channel 9 in New York City and operated WOR-TV on that channel as a commercial television station. Since that time, RKO has been the licensee of WOR-TV on VHF Channel 9 in Secaucus, New Jersey.

In 1972, RKO filed an application to renew its license to operate WOR-TV. Multi-State thereafter filed a competing application seeking a permit to construct and operate a new television station on the same channel in New York City. Because the applications were mutually exclusive, the Commission consolidated them and ordered a comparative hearing.[2] Several qualification issues desig-

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[2] *RKO General, Inc. (WOR-TV)*, 46 F.C.C.2d 246 (1974).

nated for hearing in the New York proceeding were identical to ones already designated against RKO in a pending license renewal proceeding involving RKO's renewal application for station WNAC-TV, Channel 7, in Boston, Massachusetts.[3]

In June 1980, the Commission issued a decision in the Boston proceeding in which it found that RKO lacked the requisite character qualifications for renewal of its license for WNAC-TV.[4] Based on its findings in the Boston proceeding, and without further hearing, the Commission simultaneously denied renewal of RKO's license for Channel 9 in New York.[5] On December 4, 1981, the Court of Appeals affirmed the Commission's decision with respect to the Boston proceeding on a single ground which it held was not automatically applicable to other RKO licenses.[6] Accordingly, it remanded for further proceedings the Commission's decision regarding RKO's license renewal for Channel 9 in New York.[7]

B. Efforts To Secure a Commercial VHF Station for New Jersey

While the WOR-TV litigation was pending, proceedings were taking place before the Commission to assess

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[3] *Id.* at 248-49. *See RKO General, Inc. (WNAC-TV)*, 20 F.C.C.2d 846 (1969); *RKO General, Inc. (WNAC-TV)*, 25 F.C.C.2d 633 (1970); *RKO General, Inc. (WNAC-TV)*, 30 F.C.C.2d 138 (1971).

[4] *RKO General, Inc. (WNAC-TV)*, 78 F.C.C.2d 1 (1980), *modified*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982).

[5] *RKO General, Inc. (WOR-TV)*, 78 F.C.C.2d 357 (1980), *remanded*, 670 F.2d 215 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

[6] *RKO General, Inc. v. FCC*, 670 F.2d 215, 218 (D.C. Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

[7] *Id.* at 237.

the adequacy of local commercial VHF broadcast service in New Jersey.[8] These proceedings were prompted by the dissatisfaction of New Jersey citizens with television coverage of local events—dissatisfaction which stemmed from the absence of an operating commercial VHF television station in New Jersey.[9] Although VHF Channel 13 ostensibly has been assigned to New Jersey and technically has been available for commercial use since 1952,[10] the Commission in 1961 approved the transfer of the license for that channel from a commercial operator in New Jersey to a noncommercial educational operator with studios and offices in New York.[11] As the Commission and the Court of Appeals found, the Channel 13 station has been operated noncommercially as part of the New York State educational network ever since that time.[12] Thus, there was no operating commercial VHF channel in New Jersey for more than twenty years.

The proceedings before the Commission concerning New Jersey's problem did not result in the assignment to New Jersey of an operating commercial VHF station.[13] Dissatisfied with this situation, New Jersey Congressmen

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[8] *See State of New Jersey Television Service, First Report and Order*, 58 F.C.C.2d 790 (1976), *supplemented, Second Report and Order*, 59 F.C.C.2d 1386 (1976), *supplemented, Third Report and Order*, 62 F.C.C.2d 604 (1976), *petition dismissed sub nom. New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119 (3d Cir. 1978).

[9] Pet. App. 7a.

[10] *See Television Assignments, Sixth Report and Order*, 41 F.C.C. 148, 258-59 (1952); 47 C.F.R. § 73.606(b) (1982).

[11] *NTA Television Broadcasting Corp.*, 44 F.C.C. 2563 (1961).

[12] Pet. App. 7a & 21a n.2.

[13] *See* note 8 *supra*.

introduced legislation designed to accomplish that purpose.[14]

On March 31, 1982, Senator Bradley of New Jersey introduced a bill identical in language to Section 331.[15] Referring to his State's need for a commercial VHF television station, Senator Bradley explained that the bill, "by direct[ing the Commission] to accept and grant the application of any current license holder who voluntarily requests to have its commercial VHF TV license moved to a State which does not have one," would solve "New Jersey's problem" if "a New York station owner will step forward to move to New Jersey." [16] The Sen-

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[14] Between April 1978 and July 1982 (when the bill that eventually became Section 331 was introduced), New Jersey Congressmen introduced seven bills designed to secure a commercial VHF station for their state. S.1629, Sen. Amendment No. 868, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 4961, Sen. Amendment No. 1124, 97th Cong., 2d Sess. (1982) (Sen. Bradley, D-N.J.); H.R. 2128, 97th Cong., 1st Sess. (1981) (Rep. Guarini, D-N.J.); S. 1377, Amendment No. 202, 97th Cong., 1st Sess. (1981) (Sen. Bradley, D-N.J.); H.R. 7311, 96th Cong., 2d Sess. (1980) (Rep. Maguire, D-N.J.); H.R. 11,936, 95th Cong., 2d Sess. (1978) (Rep. Maguire, D-N.J.); S.2853, 95th Cong., 2d Sess. (1978) (Sen. Case, R-N.J. & Sen. Williams, D-N.J.). The legislative history of these bills is replete with statements clearly showing that they were intended to provide New Jersey with a commercial VHF station. *See, e.g.*, 124 Cong. Rec. 9163-64 (1978) (remarks of Rep. Maguire); *id.* at 9011 (remarks of Sen. Case); *Hearings Before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce on H.R. 13015*, 95th Cong., 2d Sess., Vol. V, Pt. 2, at 212-51 (1978); H.R. Rep. No. 1352, 96th Cong., 2d Sess. (1980); H.R. Rep. No. 1438, 96th Cong., 2d Sess. (1980).

[15] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982). As the Court of Appeals found, Senator Bradley was aware at the time he introduced his bill that RKO had earlier announced its willingness to move from New York to New Jersey if it were issued a new license there for Channel 9. Pet. App. 8a n.6.

[16] 128 Cong. Rec. S3160 (daily ed. Mar. 31, 1982).

ate adopted Senator Bradley's bill, but the bill to which it was appended did not become law.[17]

Senator Bradley reintroduced the same bill on July 22, 1982.[18] The bill once again passed the Senate, was added as an amendment to the Tax Equity and Fiscal Responsibility Act of 1982, and was referred to a conference committee.[19] In its report retaining the Bradley amendment, the conference committee explicitly recognized that "New Jersey and Delaware are the only two States that do not have a commercial VHF station" and stated that the Bradley amendment was designed to implement "congressional intent that it is in the public interest for every State to have at least one VHF television station."[20] The conference committee further stated that the amendment implemented the intent of Congress by removing existing impediments that discouraged a licensee from voluntarily moving to a state which had no commercial VHF station.[21] The Bradley amendment became law on September 3, 1982.[22]

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[17] Pet. App. 10a.

[18] 128 Cong. Rec. at S8922 (daily ed. July 22, 1982).

[19] Pet. App. 9a. As the Court of Appeals noted, each conference committee member received a letter from eight Congressmen urging retention of the Bradley provision and stating that the effect of the provision "'is that WOR-TV in New York will be able to move to New Jersey and have its license reallocated there.'" Pet. App. 9a n.8 (citation omitted).

[20] H.R. Rep. No. 760, 97th Cong., 2d Sess. 690 (1982); S. Rep. No. 530, 97th Cong., 2d Sess. 690 (1982).

[21] *Id.*

[22] Section 331 provides:

> It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if

C. The Commission Decision

On September 7, 1982, RKO informed the Commission that, pursuant to the newly-enacted Section 331, it agreed to the reallocation of VHF Channel 9 from New York City to Secaucus, New Jersey upon the issuance by the Commission of a five-year license to RKO. Upon review of the language and the legislative history of Section 331, the Commission determined that RKO's agreement to reallocation of VHF Channel 9 from New York to New Jersey fell within the meaning of Section 331 and that the statute, by requiring the Commission upon notification to reallocate the existing licensee's channel and to issue a license to that licensee "notwithstanding any other provision of law," displaced the normal statutory and regulatory provisions relating to comparative hearings and the issuance of licenses.[23] Accordingly, the Commission ordered the reallocation of VHF Channel 9 from New York City to Secaucus, New Jersey and granted RKO a five-year license for that channel.[24] In a companion order, the Commission dismissed as moot the pending applications of RKO and Multi-State for VHF Channel 9 in New York City.[25]

> technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of [the Communications Act of 1934].

47 U.S.C. § 331 (1982).

[23] Pet. App. 24a.

[24] Pet. App. 29a.

[25] Pet. App. 39a.

D. The Court of Appeals Decision

Multi-State appealed the Commission's Decision and Orders to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the Commission's orders in a unanimous opinion.[26] Rejecting Multi-State's contention that the Commission had misconstrued Section 331 to apply to New Jersey, the Court of Appeals found it clear "beyond cavil that Congress intended section 331 to apply to New Jersey."[27] The court reached that judgment on the basis of a thorough examination of both the language and the legislative history of Section 331.[28] It concluded that "[t]he conference [committee] report, viewed against the backdrop of five years of legislative efforts by New Jersey Congressmen to secure a VHF station for their state, reveals that the purpose of section 331 is to provide each 'unserved' state with an *operating* VHF commercial television station."[29] Relying on this Court's precedent,[30] the Court of Appeals held that Multi-State's interpretation of Section 331 was untenable because it would thwart the clear intent of Congress and that the Commission had correctly construed Section 331 to apply to the reallocation of VHF Channel 9 from New York to New Jersey.[31]

The Court of Appeals also held that the Commission's application of Section 331 in a manner which mooted the

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[26] Pet. App. 2a.

[27] Pet. App. 10a.

[28] Pet. App. 7a-11a.

[29] Pet. App. 11a (emphasis in original).

[30] Pet. App. 7a, 11a & 15a (citing *FBI v. Abramson*, 456 U.S. 615 (1982), *Philbrook v. Glodgett*, 421 U.S. 707 (1975), and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979)).

[31] Pet. App. 11a. The Court of Appeals also rejected Multi-State's contention that RKO was not a "licensee" within the meaning of Section 331. Pet. App. 11a-13a. Multi-State has not raised this issue in its petition.

pending comparative hearing proceedings involving Multi-State's license application for VHF Channel 9 in New York did not deprive Multi-State of due process. Rejecting Multi-State's contention that it had been unconstitutionally divested of its right to a comparative hearing under *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945), the court noted that the *Ashbacker* decision conferred upon license applicants not a constitutional right, but instead a statutory right to a hearing.[32] The court reasoned further that, in enacting Section 331, Congress created a "limited exception" to the general hearing mechanisms contained in the Communications Act "to achieve the overriding objective of bringing an operational VHF commercial television station to unserved states such as New Jersey and Delaware." [33] Relying on established precedent,[34] the court then concluded that, based upon the "paramount power [of Congress] in the regulatory field," Section 331 is a "permissible regulation of future action" directing "the Commission, under specified and limited circumstances, to reallocate a VHF channel and issue a license for that channel." [35]

Multi-State filed a petition for rehearing and suggestion for rehearing *en banc*, urging essentially the same arguments now made in its petition for certiorari. On May 7, 1984, the Court of Appeals denied without opinion Multi-State's petition for rehearing. Pet. App. 47a-49a.

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[32] Pet. App. 14a (citing *Ashbacker Radio Co. v. FCC*, 326 U.S. at 333).

[33] Pet. App. 14a.

[34] *See, e.g., F.H.A. v. The Darlington, Inc.*, 358 U.S. 84 (1958); *Fleming v. Nestor*, 363 U.S. 603 (1960); *Fleming v. Rhodes*, 331 U.S. 100 (1947); *Federal Radio Commission v. Nelson Brothers Bond and Mortgage Co.*, 289 U.S. 266 (1933); *McCullough v. Virginia*, 172 U.S. 102 (1898).

[35] Pet. App. 14a.

ARGUMENT

This case does not merit review. The decision below presents none of the established grounds for exercise of this Court's certiorari jurisdiction and, in any event, is plainly correct.

1. The decision below is not in conflict with the decisions of this Court or of any other court of appeals, and the court below did not depart from the accepted and usual course of judicial proceedings. Moreover, contrary to Multi-State's assertion that this case presents "significant" and important questions,[36] the decision presents no issues "of importance to the public as distinguished from [the interests] of the parties."[37] Rather, it involves the interpretation of a statute which, as the Court of Appeals recognized, applies only in certain specific and exceedingly limited circumstances.[38] Those circumstances are highly unlikely to recur and therefore do not warrant this Court's consideration.[39]

2. The decision below is clearly correct.

a. *The Court of Appeals correctly relied upon legislative history to construe Section 331 so as not to frustrate the clear intent of Congress.* The Court of Appeals properly recognized that "[c]onstruing a statutory term . . . requires more than a superficial and isolated examination of the statute's plain words. Ascertaining

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[36] Multi-State Petition ("Pet.") at 8-9.

[37] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

[38] As the court noted (and petitioner does not deny), Section 331 is quite limited in scope. It was intended to provide those states without an operating VHF commercial television station a mechanism to obtain one, and at the time the statute was enacted, only two states—New Jersey and Delaware—fell into that category. Pet. App. 9a-10a. Therefore, the statute at most could apply in only one other instance.

[39] *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

congressional intent requires us to examine 'the context in which statutory words are set—the statute's purpose, structure and history. . . .' " [40] In analyzing the purpose, structure and history of Section 331, the court noted that, at the time Section 331 was enacted, there had been no VHF channel in New Jersey operated as a commercial television station for more than twenty years.[41] It further found that efforts to secure such a station for New Jersey had been the driving force in the enactment of Section 331.[42] And the court correctly concluded that the legislative history of Section 331 leaves no doubt that Congress intended the statute to apply to New Jersey.[43] The Court of Appeals properly refused to adopt a construction of the statute which would frustrate its very purpose.[44]

Multi-State does not dispute the conclusion of the Commission and the court below that the legislative history and the circumstances surrounding the enactment of Section 331 unequivocally demonstrate that the statute was intended to apply to New Jersey.[45] Instead, Multi-State

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[40] Pet. App. 7a (quoting *Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761 (D.C. Cir. 1984) and citing *FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982)).

[41] Pet. App. 7a.

[42] Pet. App. 8a-11a.

[43] Pet. App. 7a-11a.

[44] Pet. App. 11a (citing *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

[45] Multi-State attempts to sidestep the problem by asserting that the legislative history of Section 331 is "scanty," with only "cursory reference" in the Conference Committee Report. Pet. at 5. The legislative history, as the Court of Appeals' opinion shows, is not nearly as scanty as Multi-State suggests. Moreover, Multi-State neglects to mention that the Conference Report—as well as the frequent remarks of the statute's sponsors and proponents, and Multi-State's own letter to twenty-two Congressmen urging rejection of the Bradley amendment—uniformly and explicitly recog-

argues that, based on the so-called plain-meaning rule of statutory construction, examination of the legislative history of Section 331 is forbidden because the statute's meaning is clear on its face.[46]

Multi-State's contention is specious. As an initial matter, it is far from "plain" that on its face Section 331 excludes New Jersey.[47] More fundamentally, however, Multi-State's argument rests on a gross distortion of the plain-meaning rule of statutory construction. Multi-State is in error in suggesting that decisions of this Court compel courts to refrain from examining legislative history when interpreting a statute.[48] On the contrary, this

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nized that New Jersey was intended to fall within the scope of Section 331. Pet. App. 7a-11a & 27a.

[46] Pet. at 11-16.

[47] To divine the supposedly "plain" meaning of the statute, Multi-State resorts to the Commission's Table of Assignments, which nowhere contains the phrase "commercial television broadcast channel," *see* 47 C.F.R. § 73.606 (1982), and posits, without support, that Congress intended the phrase "very high frequency commercial television broadcast channel" in the statute to have the precise, technical meaning of any channel in the Commission's Table of Assignments that is not reserved exclusively for noncommercial educational broadcast stations. Pet. at 9-10. Yet, as the Commission itself has noted, the phrase "commercial channel" has no such technical, unambiguous meaning because "unreserved channels [in the Commission's Table of Assignments] may be used commercially, or non-commercially, as the licensee sees fit." *Amendment to Section 3.606 of the Commission's Rules and Regulations, Memorandum Opinion and Order*, 8 Rad. Reg. 467, 469-70 (1952). Contrary to Multi-State's assertion, there is no basis for contending that Section 331, which sets forth the policy that "not less than one [very high frequency commercial television broadcast] channel shall be allocated to each state," means only that the Commission's Table of Assignments should include for each state at least one VHF channel that legally could have been used commercially, even though none is in fact so used.

[48] *See* Pet. at 12-16. The cases relied upon by Multi-State are not to the contrary. In *TVA v. Hill*, 437 U.S. 153, 174-84 (1978), *Rubin v. United States*, 449 U.S. 424, 430 (1981), and *Howe v. Smith*,

Court recently cautioned that "the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " [49]

The Court of Appeals found persuasive, indeed overwhelming evidence in the legislative history that the purpose of Section 331 was to provide unserved states such as New Jersey with an operating commercial VHF station. The decision to reject Multi-State's strained interpretation of the statute and to construe Section 331 in conformity with its clearly expressed purpose was eminently proper.[50]

b. *The Court of Appeals correctly held that Multi-State was not denied due process.* The court below properly found Section 331 to be a permissible exercise by Congress of its power under the Commerce Clause to alter the regulatory field to achieve a legitimate public purpose.[51] Its decision was grounded on established prec-

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452 U.S. 473, 483-85 (1981), for instance, this Court examined the legislative history of the statute in question and concluded that it was consistent with the Court's interpretation of the statute. In *Badaracco v. C.I.R.*, —— U.S. ——, 104 S. Ct. 756 (1984), relied on by Multi-State (Pet. at 16), the Court was not even faced with the question of whether courts properly may interpret a statute in light of its legislative history. Here, on the other hand, Multi-State's interpretation of Section 331 conflicts with the clearly expressed purpose of the statute as revealed in the legislative history.

[49] *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)). *See also FBI v. Abramson*, 456 U.S. 615, 625 & n.7 (1982).

[50] *See Bob Jones University v. United States*, 461 U.S. 574, 103 S. Ct. 2017, 2025 (1983) ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute. . . .").

[51] Pet. App. 13a-15a.

edent demonstrating that the implementation of Section 331 deprived Multi-State of no cognizable vested right and was fully consistent with the requirements of due process.

Multi-State contends that the application of Section 331 by the Commission and the Court of Appeals to moot the comparative hearing proceedings for VHF Channel 9 in New York deprived it of its "antecedent right" to completion of the comparative hearing for that channel under *Ashbacker Radio Co. v. FCC*, 326 U.S. 327 (1945).[52] Multi-State further asserts that, by virtue of its continued participation in the comparative hearing, this "right" became a "protected property interest" which "became rooted in the Constitution."[53]

As the court below found, Multi-State's argument rests on a misreading of this Court's decision in *Ashbacker* and a misunderstanding of the broad powers of Congress to alter the statutory framework of regulation it has created. Contrary to Multi-State's assertion, the right of an applicant to compete in a comparative hearing under *Ashbacker* is not "rooted in the Constitution"; rather, it derives from a general statutory scheme which, under some circumstances, precludes denial of an application without a hearing.[54] But it does not follow, as Multi-State suggests, that this statutory right to a hearing may somehow be transformed into a right to continuation of a comparative hearing where, as here, the license sought (for Channel 9 in New York) is no longer available because the pertinent channel has been reallocated pursuant to the directive of Congress. Indeed, the law is clear that there is no right to a hearing for a channel that has been made unavailable by a valid

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[52] Pet. at 17-20.

[53] *Id.* at 18.

[54] *See Ashbacker Radio Co. v. FCC*, 326 U.S. at 330; 47 U.S.C. § 309(a) (1982).

Commission decision to remove a previously available frequency.[55] There can be no greater right to a hearing where, as here, Congress in Section 331 has required the Commission to make just such a decision.

In addition, the Act specifically denies existing licensees any ownership interest in the channels they use and any right to operate a station or to use a frequency beyond the terms of the license.[56] Thus, as this Court held more than fifty years ago, even existing licensees acquire no prescriptive right against the subsequent exercise of congressional power under the Commerce Clause to delete their stations in order to attain a fair distribution of broadcast service.[57] *A fortiori*, mere applicants such as Multi-State can have no such right.

Section 331 represents a limited alteration by Congress of the statutory framework governing the allocation of broadcast frequencies and the issuance of broadcast licenses.[58] Contrary to Multi-State's assertion, Section 331

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[55] *See, e.g., Transcontinent Television Corp. v. FCC*, 308 F.2d 339, 344 (D.C. Cir. 1962); *Bendix Aviation Corp., Bendix Radio Division v. FCC*, 272 F.2d 533, 537 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 965 (1960); *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24, 26 (D.C. Cir. 1954) (upholding the Commission's television allocation plan under which "all applications for licenses not conforming to the over-all plan [were] automatically dismissed").

[56] 47 U.S.C. §§ 301 & 309(h) (1982).

[57] *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 282 (1933). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389 (1969) ("Congress unquestionably has the power to grant and deny licenses and to eliminate existing stations.").

[58] The procedural due process cases cited by Multi-State—*Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek v. Jones*, 445 U.S. 480 (1980); *Barry v. Barchi*, 443 U.S. 55 (1979); *Goss v. Lopez*, 419 U.S. 565 (1975); *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)—are

is not retroactive legislation, and it was not applied retroactively to moot Multi-State's pending application.[59] Section 331 simply does not impose on Multi-State any "unexpected liability for past, completed acts that were legally proper" when performed.[60] Instead, as the Court of Appeals found, it merely regulates future action by directing the Commission, under certain limited circumstances, to reallocate a VHF channel and to issue a license on the reallocated channel to the existing license holder.[61] The Court of Appeals decision in this respect is not only quite narrow in scope; it is clearly correct.[62]

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inapposite. Pet. at 18-19. None of those cases concerned the scope of protected property interests in the context of rights previously acquired and subsequently altered pursuant to a congressionally enacted regulatory scheme. *See, e.g., F.H.A. v. The Darlington, Inc.*, 358 U.S. 84, 91 & n.6 (1958). Moreover, this Court has made clear that procedural due process applies only to the adequacy of procedural provisions governing the deprivation of protected property interests; it does not limit the legislature's power to adjust or even to terminate government programs or regulatory schemes. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 432-33. In the latter circumstance, "the legislative determination provides all the process that is due." *Id.* at 433. Section 331 represents just such a legislative determination.

[59] Pet. at 20-21.

[60] *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

[61] Pet. App. 14a. *See also F.H.A. v. The Darlington, Inc.*, 358 U.S. at 91:

> Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution. So long as the Constitution authorizes the subsequently enacted legislation, the fact that its provisions limit or interfere with previously acquired rights does not condemn it.

[62] Multi-State also asserts that the application of Section 331 to moot the pending application proceeding violated equal protection. Pet. at 21-22. The argument, which Multi-State failed to raise until its petition for rehearing in the Court of Appeals, is without merit. As this Court held in *Hodel v Indiana*, 452 U.S. 314, 331

CONCLUSION

For the foregoing reasons, and those stated in the Brief in Opposition for Respondent Federal Communications Commission, the petition for writ of certiorari should be denied.

Respectfully submitted,

J. ROGER WOLLENBERG *
JOEL ROSENBLOOM
TILLMAN L. LAY
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

HAROLD DAVID COHEN
WILLIAM H. FITZ
JACK N. GOODMAN
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
(202) 331-8566

Counsel for Respondent
RKO General, Inc.

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* Counsel of Record

(1981), "Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose." Section 331 does not employ suspect classifications, nor does it impinge upon any fundamental right. Multi-State does not even mention, much less dispute, that Section 331, by providing an incentive for an existing licensee to step forward and relocate its station in a state previously unserved by a commercial VHF station, is rationally related to the legitimate objective of providing every state with an operating commercial VHF station. *See* Pet. App. 14a-15a.